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No. 91-837

In the Supreme Court of the United States

OCTOBER TERM, 1991

GERALD KRESS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, under principles of *res judicata*, petitioner's failure to appeal the denial of a motion pursuant to former Fed. R. Crim. P. 35 barred him from obtaining appellate review of the denial of a subsequent Rule 35 motion that raised the same issue as the first motion.

2. Whether the interest rate set by the sentencing court in an order of restitution that deferred payment of the amount owed impermissibly burdened petitioner's right to appeal, in violation of the Due Process Clause.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 944 F.2d 155.

JURISDICTION

The judgment of the court of appeals was entered on September 16, 1991. A petition for rehearing was denied on October 18, 1991. Pet. App. 23a-24a. The petition for a writ of certiorari was filed on November 25, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a conditional plea of guilty in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted of 13 counts of mail fraud, in violation of 18 U.S.C. 1341; 20 counts of making false statements to a government agency, in violation of 18 U.S.C. 1001; 21 counts of filing false claims, in violation of 18 U.S.C. 287; and five counts of paying gratuities to a public official, in violation of 18 U.S.C. 201(f). He was sentenced to a prison term of a year and a day, to be followed by five years' probation. C.A. App. 45a-47a. As a condition of his probation, he was ordered to pay the government $300,000 in restitution. *Ibid.* Petitioner appealed, challenging only his conviction. The court of appeals affirmed. *United States* v. *Educational Development Network Corp.*, 884 F.2d 737 (3d Cir. 1989), cert. denied, 494 U.S. 1078 (1990).[1] Thereafter, petitioner moved the district court under Fed. R. Crim. P. 32.1(b) to modify the terms of his probation. The district court denied the motion. Pet. App. 4a-5a. The court of appeals affirmed. Pet. App. 1a-21a.

1. Between 1983 and 1987, petitioner and EDN had a contract with the Department of Defense to provide an educational and employment training program to the Army National Guard Bureau. *United States* v. *Educational Development Network Corp.*, 884 F.2d at 738; Pet. App. 13a n.9. The indictment

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[1] Petitioner and Educational Development Network Corporation (EDN), which was wholly owned by petitioner, were jointly indicted. Pet. App. 3a n.1. Like petitioner, EDN pleaded guilty to the indictment. The district court imposed a fine of $100,000 on EDN. C.A. App. 48a-50a.

to which petitioner pleaded guilty arose from his submission of inflated estimates of EDN's costs under the contract and from his payment of illegal gratuities to the Guard's contract officer responsible for approving those costs. 884 F.2d at 739.

2. The district court found that the government "suffered actual damage and loss" of $300,000 as a result of petitioner's fraud. C.A. App. 23a-24a. Based upon the presentence report and testimony at the sentencing hearing, the court further found that petitioner "ha[s] the financial capacity to pay the restitution * * * within the period of probation." *Id.* at 24a. The court made the $300,000 payable in 60 monthly installments, with payment to begin upon commencement of petitioner's probation. Interest on the unpaid balance was to begin accruing on the day of sentence—March 14, 1989—and was to be "computed at the rate of 1.5 per cent a month as provided in 18 [U.S.C.] 3565." *Ibid.*[2]

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[2] Former 18 U.S.C. 3565, which governed the collection and payment of fines and penalties, was repealed by the Act of Oct. 12, 1984, Pub. L. No. 98-473, Tit. II, ch. II, § 212(a)(2), 98 Stat. 1987. Section 235 of Pub. L. No. 98-473 makes former 18 U.S.C. 3565 applicable to offenses committed before November 1, 1987. *See* 18 U.S.C. 3551 note.

Former 18 U.S.C. 3565(b)(2) provided:

> If the judgment specifies other than immediate payment of a fine or penalty, the period provided for payment shall not exceed five years, excluding any period served by the defendant as imprisonment for the offense. The defendant shall pay interest on any amount payment of which is deferred under this paragraph. The interest shall be computed on the unpaid balance at the rate of 1.5 percent per month for each full calendar month for which such amount is unpaid.

3. On April 14, 1989, while his appeal of his conviction was pending,[3] petitioner moved the district court pursuant to former Fed. R. Crim. P. 35[4] to reduce the interest rate on the restitution to 10.43 per cent annually, the rate of interest allowable under 28 U.S.C. 1961 for civil judgments at the time of petitioner's sentencing. Pet. App. 4a, 14a; C.A. App.

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[3] Petitioner was free on bail pending appeal (Pet. 9) and pending this Court's disposition of his first petition for certiorari (Pet. 10).

[4] The version of Fed. R. Crim. P. 35 applicable to offenses, such as petitioner's, that were committed before November 1, 1987, provided in pertinent part:

> Correction or Reduction of Sentence.
>
> (a) Correction of Sentence. The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence.
>
> (b) Reduction of Sentence. A motion to reduce a sentence may be made, or the court may reduce a sentence without motion, within 120 days after the sentence is imposed or probation is revoked, or within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of any order or judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction * * *.

Former Rule 35 was amended by Pub. L. No. 98-473, Tit. II, § 215(b), 98 Stat. 2015, and by Pub. L. No. 99-570, Tit. X, § 1009, 100 Stat. 3207-8. Current Rule 35 sharply limits a district court's authority to correct or reduce sentences. Subsection (a) of the Rule permits correction of a sentence only upon remand from a court of appeals. Subsection (b) permits reduction of a sentence for changed circumstances upon motion by the government. Subsection (c) permits correction of a sentence imposed as a result of arithmetical, technical, or other clear error within seven days after the imposition of sentence.

55a-59a. On June 5, 1989, the district court vacated petitioner's 366-day prison term, substituting a prison term of four months. In addition, the court reiterated the terms of its restitution order, including the applicable rate of interest. Pet. App. 4a, 12a n.8, 14a; C.A. App. 51a-53a, 69a-71a. Petitioner did not appeal that ruling. Pet. App. A14.[5]

4. On April 19, 1980, three days after this Court denied his first petition for certiorari, petitioner filed a second Rule 35 motion. Pet. App. 4a. In that motion, petitioner asked the court to vacate his four-month prison term and to set aside the restitution order in light of a civil action that the government had filed against him. See Memorandum in Support of Motion at 3-13. Petitioner also claimed that he was unable to pay the interest on the restitution, but he offered no evidence on that point. Pet. App. 20a. The district court denied the motion. Pet. App. 4a, 20a. Petitioner then served his prison term and was released on October 2, 1990. Pet. App. 4a. Petitioner paid $300,000 in restitution on December 18, 1990. Gov't C.A. Br. 4.

5. On January 2, 1991, petitioner filed a pleading entitled "Motion for Modification of Conditions of Probation" under Rule 32.1(b). Pet. App. 4a, 14a; C.A. App. 6a, 66a-68a. In the motion, petitioner stated that the United States Attorney had demanded that

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[5] Petitioner states (Pet. 10) that he "formally withdrew his Rule 35 Motion without prejudice on June 20, 1989," *i.e.*, five days after his time to file a notice of appeal expired. See Fed. R. App. P. 4(b). The district court's docket sheet for 1989 contains the following entry for June 20, 1989: "Praecipe to remove without prejudice, deft's motion pursuant to rule 35, cert. of service, filed." C.A. App. 5a. There is no subsequent entry on this matter.

he pay pre-probation interest totaling approximately $95,000. Pet. App. 5a n.3. Petitioner asked the court to modify or clarify its sentencing order to reflect that interest on the restitution did not begin to accrue until his release from prison. Pet. App. 4a-5a. On March 12, 1991, the district court denied the motion. Pet. App. 5a; C.A. App. 81a. Petitioner appealed the denial of the motion.

6. The court of appeals affirmed. Pet. 1a-21a. As an initial matter, the court held that the Victim and Witness Protection Act (VWPA), 18 U.S.C. 3663-3664, implicitly authorized the district court to require petitioner to pay post-judgment interest on the restitution that he owed the government. Pet. App. 6a-11a. The court also ruled that the district court had properly ordered the interest to be computed from the date that petitioner was sentenced, rather than—as petitioner had contended—from the date that he began serving his probation. Pet. App. 11a-12a.

The court of appeals also held that principles of *res judicata* barred petitioner's claim that the district court had erred in setting a rate of interest in excess of the rate applicable to civil judgments at the time he was sentenced. Pet. App. 13a-18a. Treating petitioner's Rule 32.1(b) motion as one brought under Rule 35(a) (Pet. App. 5a n.4, 14a),[6] the court reasoned that petitioner had failed to appeal the denial of his first Rule 35 motion, in which he had raised the identical claim, and that he filed the second mo-

[6] The court explained that petitioner's purported Rule 32.1(b) motion "directly challenged the legality of the sentencing order," while Rule 32.1(b) simply provides a vehicle for clarifying the conditions of probation or modifying them because of changed circumstances. Pet. App. 5a n.4.

tion "in an attempt to avoid the repercussions of his failure to appeal." Pet. App. 18a. The court stated that it would "refuse * * * to allow through our back door what could not enter through our front door." Pet. App. 17a. Accordingly, the court held that petitioner "cannot relitigate the same issue two years later in the form of a second Rule 35 motion." Pet. App. 15a.

Finally, the court rejected petitioner's claim that the accrual of interest while his appeal was pending impermissibly burdened his right to appeal. Pet. App. 18a-21a. Because petitioner had failed to raise the issue in the district court, the court reviewed the claim for plain error. Pet. App. 19a. The court determined that the district court had not committed any error, let alone plain error, in assessing interest at the statutory rate against petitioner during his appeal. *Ibid.* The court explained that the VWPA "provides defendants like [petitioner] all the process they are due by guaranteeing procedures to protect their rights," and that the district court had complied with the VWPA. Pet. App. 20a. In particular, the court noted, 18 U.S.C. 3664(a) required the district court to consider "the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents, and such other factors as the court deems appropriate" in fashioning an order of restitution. Pet. App. 19a. Observing that the district court had found that petitioner could afford to pay $300,000 in restitution and 18 per cent interest on the principal, the court stated that petitioner had

> similarly failed to demonstrate an inability to pay restitution plus interest or any interference with his right to appeal. To the contrary, [pe-

> titioner] appealed his conviction up to the Supreme Court and paid the full amount of restitution without interest shortly after his release from prison, suggesting that he at all times could afford to pay restitution and could absorb the cost of his appeals.

Pet. App. 20a. The court concluded that "[t]here is nothing to indicate that the interest unduly burdened [petitioner's] right to an appeal." *Ibid.*

ARGUMENT

Petitioner does not challenge the district court's authority under the Victim and Witness Protection Act to assess interest on the restitution he owed the government pending his appeal. Nor does petitioner challenge the district court's authority to order that the interest accrue from the date of sentence. Instead, petitioner contends (Pet. 14-17) that to the extent that the 18 per cent interest rate set by the district court exceeded the "market" rate of interest,[7] it was punitive rather than compensatory and burdened his right to appeal, in violation of the Due Process Clause. As the court of appeals correctly ruled, however, petitioner's failure to appeal the district court's June 5, 1989, order denying his first (April 14, 1989) motion under former Rule 35 in

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[7] Petitioner does not identify the particular market that he would use as the standard for determining "market" rate. By providing for a specific statutory rate of interest in former 18 U.S.C. 3565(b)(2), Congress avoided the problems that would have been created had the court been forced to determine what "market" to use in setting the rate for use in restitution orders, and how to treat changes in that "market rate" during the period between the offense (from which the restitutionary obligation had its origins) and the ultimate satisfaction of the obligation.

which he challenged the interest rate barred him, under principles of *res judicata*, from obtaining appellate review of the district court's March 12, 1991, order denying his second (January 2, 1991) motion in which he raised the same issue. In any event, petitioner's claim lacks merit. Accordingly, review by this Court is not warranted.

1. Petitioner challenges (Pet. 17-22) the court of appeals' refusal to review his challenge to the rate of interest on two grounds. First, he claims that the district court's June 5, 1989, order did not dispose of that portion of his first motion in which he challenged the interest rate. In petitioner's view, the order "had to do only with the length of defendant's incarceration, an issue not raised in the April 1989 motion." Pet. 18. Second, petitioner argues that the principles of *res judicata* do not apply to Rule 35 motions in any event. Both arguments are unavailing.

a. As the court of appeals recognized (Pet. App. 14a), "[w]hile the [district] cour did not state that its [June 5, 1989] order was in response to [petitioner's] motion of April 14, 1989, it could not have been otherwise." That order, entitled "Amended Judgment in a Criminal Case," vacated the original judgment in the case and entered a new judgment. C.A. App. 51a-53a, 69a-71a. In addition to reducing petitioner's prison term to four months, the district court reiterated its earlier finding that the government had "suffered actual damage or loss" in the amount of $300,000 as a result of petitioner's crimes, that petitioner had the ability to pay restitution in that amount, and that interest should be assessed on the restitution amount at the rate of 1.5 per cent per month from the date of the original sentence. *Ibid.* The court of appeals correctly ruled that the district court's June 5 order constituted a partial grant and

a partial denial of petitioner's April 14 motion, and further review of the adequacy of that ruling would in any event be unwarranted.

b. "The federal courts have traditionally adhered to the * * * doctrine[] of res judicata," under which "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Allen* v. *McCurry*, 449 U.S. 90, 94 (1980). The district court's June 5, 1989, order denying the interest rate claim that petitioner raised in his first motion under former Rule 35 was a final judgment on the merits. Having failed to appeal that ruling, petitioner could not relitigate the issue on an appeal from the district court's denial of a subsequent Rule 35 motion.

Petitioner contends (Pet. 18-19) that this Court's decision in *Heflin* v. *United States*, 358 U.S. 415 (1959), "squarely establishes" that *res judicata* principles do not apply to Rule 35 motions. We submit that that contention is incorrect. In *Heflin*, this Court held that relief under 28 U.S.C. 2255 was unavailable to a prisoner who, while in custody under a valid sentence, sought to attack a sentence that he had not yet begun to serve. 358 U.S. at 418. The Court, however, treated the prisoner's motion as one for relief under former Rule 35 and entertained it even though the petition for certiorari—while timely filed for an independent civil suit under Section 2255—was untimely filed for a Rule 35 motion, which is made in the original, criminal case. 358 U.S. at 418 n. 7.[8] In a footnote, the Court explained that, "because successive

[8] At the time *Heflin* was decided, the time for filing a petition for a writ of certiorari in a criminal case was 30 days under the Rules of this Court, while the time for filing a petition in a civil case was 90 days under 28 U.S.C. 2101(c). See *Heflin*, 358 U.S. at 418 n.7.

motions may be made under Rule 35 and because no jurisdictional statute is involved, the majority agrees to dispense with the requirements of our Rule [as to timely filing] in order to avoid wasteful circuitry." *Ibid.* It is that language that petitioner seizes upon for the proposition that *res judicata* principles are inapplicable to Rule 35 motions. But the language does not establish that proposition.

The *Heflin* footnote does not state a general rule precluding any application of the doctrine of *res judicata* to Rule 35 motions. The footnote simply states the basis for the Court's decision to dispense with the non-jurisdictional time requirement for filing a petition for certiorari in a criminal case. The footnote does not mention the doctrine of *res judicata*, and it seems unlikely that by referring to the permissibility of successive Rule 35 motions, the Court meant to suggest that *res judicata* principles have no application in the Rule 35 setting. At most, the footnote suggests that the Court may have believed that an exception to the doctrine of *res judicata* would have been applicable on the highly unusual facts of that case.[9]

The general issue of the application of *res judicata* in Rule 35 cases was neither briefed nor argued in *Heflin*,[10] and petitioner cites no decision of any court

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[9] The petitioner in *Heflin* had originally filed his motion under both 28 U.S.C. 2255 and Rule 35. See Brief for the United States at 12-13. His petition for a writ of certiorari was timely insofar as it was filed in a Section 2255 civil proceeding, but untimely insofar as it was filed in a Rule 35 proceeding. The question whether a Section 2255 remedy was available in the circumstances of his case was apparently an unsettled question until this Court's decision in *Heflin* itself. See 358 U.S. at 418.

[10] The Brief for the United States in *Heflin* "recognize[d] * * * that if petitioner should properly prevail under Rule 35,

that has construed the *Heflin* footnote as he does. Moreover, any determination that *res judicata* does not apply to Rule 35 motions in the circumstances of this case would conflict with Fed. R. App. P. 4(b), which provides that the notice of appeal in a criminal case is to be filed within ten days of the entry of the judgment or order appealed. That time limit is mandatory and jurisdictional, and it applies to all criminal appeals, including appeals of denials of Rule 35 motions. See *United States* v. *Anna*, 843 F.2d 1146, 1147 (8th Cir.), on appeal after remand, 863 F.2d 31 (8th Cir. 1988); *United States* v. *Naud*, 830 F.2d 768, 769 (7th Cir. 1987). Rule 4(b) would be effectively nullified as to Rule 35 motions if it could be circumvented as easily as petitioner suggests, *i.e.*, simply by filing another Rule 35 motion.[11]

To be sure, a few courts of appeals have suggested that because former Rule 35 allowed the correction of an illegal sentence at any time, the doctrine of *res judicata* is inapplicable to motions under the Rule. See, *e.g.*, *United States* v. *Mazak*, 789 F.2d 580, 581 (7th Cir. 1986); *United States* v. *Quon*, 241 F.2d 161, 163-164 (2d Cir.), cert. denied, 354 U.S. 913 (1957); *Ekberg* v. *United States*, 167 F.2d 380, 384 (1st Cir. 1948). Any conflict between those decisions and

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the same issue [whether the sentence petitioner had not yet begun to serve was valid] could be raised by a new motion under that rule, and to that extent the question is not academic at this time." Br. at 12.

[11] Cf. *United States* v. *Ursillo*, 786 F.2d 66, 71 (2d Cir. 1986) (even assuming that Fed. R. Crim. P. 32 gave district court jurisdiction to consider challenge to presentence report over a year after sentence was imposed, defendant would not be allowed to relitigate issue where district court had previously denied Rule 35 motion raising same issue and defendant had not appealed that denial).

the ruling below is of no continuing importance, however, in light of the amendment to Rule 35 eliminating the provision that a district court may correct an illegal sentence at any time.[12]

2. Petitioner's challenge to the rate of interest provided for in the restitution order (Pet. 14-17) lacks merit in any event. It is true, as the court of appeals recognized (Pet. App. 18a-19a), that due process precludes a sentencing court from punishing a defendant for pursuing an appeal. *North Carolina* v. *Pearce*, 395 U.S. 711, 724 (1969). As the court ruled, however, petitioner received "all the process [he was] due" (Pet. App. 19a-20a), by virtue of the district court's careful compliance with the VWPA's requirement (18 U.S.C. 3664(a)) that it assess his ability to pay in fashioning a restitution order, and by the district court's determination that petitioner "could afford to pay $300,000 in restitution, and could afford to pay eighteen per cent interest on the principal, with that interest to begin accruing immediately." Observing that in the district court petitioner "did not offer any evidence to call [that finding] into question" (Pet. App. 20a), the court of appeals correctly noted that on appeal petitioner "similarly failed to demonstrate

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[12] The lack of continuing importance of the court of appeals' *res judicata* determination also disposes of petitioner's suggestion that this Court should grant review in order to consider whether to treat successive motions under former Rule 35 like successive habeas corpus petitions, to which the doctrine of *res judicata* is not strictly applicable. See *McCleskey* v. *Zant*, 111 S. Ct. 1454, 1462-1467 (1991). On this point it is sufficient to note that the relationship between habeas corpus and *res judicata* is sui generis. It was precisely because denials of the writ were not reviewable at all at common law that they were held not to bar renewed applications for the writ. *Id.* at 1462.

an inability to pay restitution plus interest or any interference with his right to appeal." *Ibid.* That fact was particularly significant because the interest rate that petitioner was assessed was far from confiscatory; it was only a few percentage points higher than what he himself identified as the "market" rate. Accordingly, the court of appeals was correct in concluding (*ibid.*) that petitioner "at all times could afford to pay restitution and could absorb the cost of his appeals," and that "[t]here is nothing to indicate that the interest unduly burdened [his] right to an appeal." [13]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1992

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[13] Petitioner argues (Pet. 16) that the ruling below is inconsistent with *Hughey* v. *United States*, 110 S. Ct. 1979 (1990). As petitioner acknowledges (Pet. 16), however, in *Hughey* this Court held that the VWPA authorizes restitution only for losses caused by the specific conduct that is the basis for the offense of conviction, as opposed to losses related to other alleged offenses. 110 S. Ct. at 1981. *Hughey* does not address the question of the rate of interest that may be assessed on restitution awarded under the VWPA.

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